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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1983

RUEL A. GALBREATH,

Appellant,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC., and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. IS SECTION 447.401 OF THE FLORIDA STATUTES UNCONSTITUTIONAL ON ITS FACE FOR REMOVING THE DUTY OF FAIR REPRESENTATION FROM LABOR ORGANIZATIONS TO NON-DUES-PAYING MEMBERS OF THE CERTIFIED BARGAINING UNIT WHILE MAINTAINING THE UNION'S EXCLUSIVE RIGHT TO REPRESENT SAID EMPLOYEES.

II. DOES SECTION 447.401 OF THE FLORIDA STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION BY DISTINGUISHING BETWEEN CLASSES OF EMPLOYEES (MEMBERS AND NON-MEMBERS) ON A BASIS WHICH IS UNRELATED TO THE MERITS OF AN EMPLOYEE'S GRIEVANCE.

III. WAS APPELLANT GALBREATH (A NON-DUES-PAYING MEMBER OF THE CBU) DENIED DUE-PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION WHEN THE UNION REFUSED TO REQUEST ARBITRATION TO ALLOW HIM TO PROCEED WITH HIS OWN LEGAL COUNSEL WHERE THE SCHOOL

BOARD ALSO REFUSED TO PERMIT HIM TO GO TO ARBITRATION WITH HIS OWN LEGAL COUNSEL.

IV. CAN THE UNION MEET THE DUE PROCESS REQUIREMENT OF AN UNBIASED ADJUDICATOR WHILE DETERMINING THE MERITS OF APPELLANT GALBREATH'S GRIEVANCE WHERE ITS DUTY OF FAIR REPRESENTATION TO HIM HAS BEEN REMOVED BY SECTION 447.401 OF THE FLORIDA STATUTES.

V. IS REMOVAL OF THE DUTY OF FAIR REPRESENTATION FROM A LABOR ORGANIZATION TO NON-DUES-PAYING MEMBERS OF THE CERTIFIED BARGAINING UNIT IN CONFLICT WITH FEDERAL LABOR LAW AS ESTABLISHED BY UNITED STATES SUPREME COURT DECISIONS.

VI. SHOULD THE UNION HAVE THE BURDEN TO PRODUCE EVIDENCE TO SHOW THAT THE REASON IT FAILED TO REQUEST ARBITRATION WAS BECAUSE THE GRIEVANCE LACKED MERIT BASED UPON A REASONABLE INVESTIGATION AND THAT THE REASON FOR REFUSING TO REQUEST ARBITRATION WAS NOT BECAUSE GALBREATH WAS A NON-DUES-PAYING MEMBER OF THE CERTIFIED BARGAINING UNIT.

VII. SHOULD GALBREATH BE PERMITTED TO TAKE HIS GRIEVANCE TO ARBITRATION WITH HIS OWN LEGAL COUNSEL.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 446 So.2d 1045 (Fla. 1984). (A-1). The opinion of the Court of Appeal is reported at 424 So.2d 837 (Fla. 4th

DCA 1983). (A-16). The summary dismissal by PERC of Galbreath's ULP charges is reported at 7 Fla. Pub. Employees Rep. (Lab.Rel. Press), ¶12,287 (A-33,37) and ¶12,288. The Florida Public Employee Reporter will hereafter be cited as "F.P.E.R.". Cites to the Appendix are by page number.

JURISDICTION

This case arose out of a dispute Galbreath had with his employer, The School Board of Broward County, Florida, regarding overtime pay. At all times material to this appeal, Galbreath was a member of the Certified Bargaining Unit but he was not a dues-paying member of the union. The dispute was processed through the first and second steps of the grievance procedure by Galbreath, with the union sitting in. Access to arbitration, Step III, was controlled exclusively by the union, pursuant to the Collective Bargaining Agreement. The union refused to invoke arbitration at Galbreath's request, even though he advised the union he would provide his own legal counsel. The School Board also refused to permit Galbreath to go to arbitration with his own legal counsel on the basis that the union had not invoked arbitration.

Galbreath filed an unfair labor practice charge against both the school board and the union. The charge alleged the union's refusal to allow Galbreath to go to arbitration with his own legal counsel resulted in denial of due process. Galbreath also alleged the effect of the refusal was to coerce him into joining the union in order to get to arbitration. Galbreath initiated his contitutional attack against Section 447.401 of the Florida Statutes in the ULP charge. He also alleged said statute

was inconsistent with principles of Federal Labor Law. (A-42). Without requiring a hearing or production of any evidence from the school board or union, the Public Employees Relations Commission summarily dismissed Galbreath's ULP charge. *Galbreath v. Broward County Classroom Teachers' Ass'n.*, 7 F.P.E.R. ¶12,288 (1981); *Galbreath v. Broward County School Bd.*, 7 F.P.E.R. ¶12,287 (1981). Galbreath took a timely appeal of PERC'S order to the District Court of Appeal, Fourth District, State of Florida. After briefing, oral argument, and supplemental briefing, the Court of Appeal affirmed PERC'S summary dismissal. *Galbreath v. School Board of Broward County et al.*, 424 So.2d 837 (Fla. Dist. Ct. App. 1983). (A-16). However, the Court certified a question to the Florida Supreme Court for consideration on the basis the question was of great public importance. After briefing and oral argument, the Florida Supreme Court affirmed the Court of Appeal's decision. *Galbreath v. School Board of Broward Co., et al.*, 446 So.2d 1045 (Fla. 1984). (A-1). With reference to Appellant's constitutional attack on F.S. §447.401, the Florida Supreme Court said: "We also find Galbreath's constitutional attack on Section 447.401, Florida Statutes (1979) to be without merit." (A-9). Galbreath appealed to this Court, said decision, which was issued on January 26, 1984, rehearing denied on April 5, 1984. (A-11). The Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Florida on May 4, 1984. (A-13). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (2).

Decisions sustaining jurisdiction of this Court to review the decision below on direct appeal are: *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Cohen v. California, 403 U.S. 15, 17, 18 (1971)*; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 Footnote 3

(1963); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). In *Japan Line, Ltd.* a number of appellant's containers were temporarily present in the County of Los Angeles, and the County levied property taxes on the containers. The California Supreme Court upheld the tax as applied. The United States Supreme Court held:

> This Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. §1257(2). In this case, appellants drew in question the validity of California's ad valorem property tax, contending that the tax, as applied to their containers, was repugnant to the Commerce Clause and various treaties, and the California Supreme Court sustained the validity of the tax. Under these circumstances, this Court's appellate jurisdiction would seem manifest . . . Appellants squarely challenged the constitutionality of the tax statute as applied and the California Supreme Court just as squarely sustained its validity, as applied. We have held consistently that a state statute is sustained within the meaning of §1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds . . . Citations omitted.
>
> 441 U.S. at 441

The *Japan Line Ltd.* case is practically "on all fours" with the *Galbreath* case on the jurisdictional issue. Galbreath squarely challenged the constitutionality of F.S. §447.401 on its face and as applied, and the Florida Supreme Court just as squarely sustained its validity. In *Dahnke-Walker Co.*, this Court stated:

> The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be on a writ of error: and if it be resolved against the validity the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put
>
> 257 U.S. at 289

In headnote No. 6 of the Florida Supreme Court decision, the following is stated with reference to the consitutionality of F.S. §447.401:

> Statute which provided that all public employees had right to fair and equitable grievance procedure regardless of membership or non-membership in any organization, but which provided that certified employee organizations would not be required to process grievances for employees who were nonmembers of the organization, was not unconstitutional.
>
> 446 So.2d 1045

Galbreath maintains the record shows he raised federal questions below and the Court ruled on the same. This is clearly a proper case for appeal.

If this Court does not consider an appeal to be the proper mode of review, Galbreath requests that these papers be acted upon as a petition for certiorari pursuant to Title 28, U.S.C., Sec. 2103. The issues presented in this case meet the criteria for this Court to issue a Writ of Certiorari, in that the Florida Supreme Court has decided a question in a way in conflict with applicable decisions of the U.S. Supreme Court. The decision of the Florida Supreme Court directly conflicts with the principles of this Court announced in a line of cases, the most significant being *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). This conflict between the State Court decision and decisions of this Court will be further discussed under the heading "The Federal Questions are Substantial".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The First Amendment provides in part: "Congress shall make no law abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S.C.A. Const. Amend. I

II. The Fifth Amendment provides in part that: "No person shall be . . . deprived of life,

liberty, or property, without due process of law . . ."

U.S.C.A. Amend. V

III. The Fourteenth Amendment provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S.C.A. Amend. XIV §1

IV. Florida Statute Section 447.307 (3)(b) provides: "When an employee organization is selected by a majority of the employees voting in an election, the commission shall certify the employee organization as the exclusive collective bargaining representative of all employees in the unit."

West's F.S.A. §447.307 (3)(b)

V. Florida Statute, Section 447.401 provides in part: *"Grievance procedures* . . . Each public employer and bargaining agent *shall* negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective bargaining agreement. Such grievance procedure *shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties* . . . All public employees shall have

the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, *except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization . . .*"
(emphasis added Note: Laws 1977, c.77-343 added the exception in the last sentence)

West's F.S.A. §447.401

VI. Article I §6 of The Florida Constitution provides: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

West's F.S.A. Const. Art. I §6

STATEMENT OF THE CASE

For simplicity, the following abbreviations will be used throughout this Jurisdictional Statement.

Appellant
RUEL A. GALBREATH ..... Galbreath

Appellees
THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA ..... School Board

THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC ..... Union or CTA

THE PUBLIC EMPLOYEES RELATIONS COMMISSION ..... PERC

Unfair Labor Practice ..... ULP

Employee included in the Certified Bargaining Unit who is not a dues-paying-member of the union ... Non-dues-paying member of CBU

I. Parties and Contractural Relationship Galbreath teaches horticulture in the Broward County Public School System. The union, which is an employee-organization under Chapter 447, Florida Statutes, and the Employer School Board are parties to a collective bargaining agreement which is applicable to an exclusive bargaining unit consisting of certain job classifications in the Broward County School System. The teacher position held by Galbreath is included in said unit and thus he is a member of the unit which the union has been given an exclusive statutory right to represent. Even though Galbreath cannot withdraw from the certified bargaining unit, he is not required to become a member or to pay dues to the union in the State of Florida, pursuant to the Right-to-Work Law. West's F.S.A. Const. Art. I §6. At all times material to this case, Galbreath was in the status commonly referred to as a non-dues-paying member of the certified bargaining unit. The Collective Bargaining Agreement between the union and the school board gave the union exclusive control over the final arbitration step in the three-step grievance procedure.

II. Facts. Galbreath filed a grievance regarding overtime pay and requested to use his own legal counsel to represent him. The school board denied his request. Galbreath proceeded without his own legal counsel under protest and his grievance was denied by the school board at Steps I and II. A union representative sat in the first two steps of the grievance procedure. Galbreath asked the union to request arbitration under Step III of the grievance procedure. In a letter dated October 20, 1983, Union Official Paul LaChance advised Galbreath that the CTA had decided not to pursue his case to arbitration, since, in the judgment of the CTA, it lacked merit. The letter went on to state: "In an effort to perserve your rights, we have requested and received an extension of the timeliness to file for arbitration to October 31, 1980. A letter from Mr. Siegle will confirm. I would recommend that you discuss this letter with your attorney to determine if you and he would want to pursue the matter on your own." However, when a demand for arbitration was made upon the school board, it rejected the demand.

Galbreath filed a petition with PERC alleging the union and school board had committed an unfair labor practice and that his right to due process had been violated. He also alleged that F.S. §447.401 was inconsistent with Federal Labor Law. (A-42).

III. Summary Dismissal by PERC. Galbreath never had an evidentiary hearing on the ULP charge. PERC summarily dismissed the charge despite correspondence appended to the charge to show that his principal acknowledged that Galbreath might have been negligent had he not taken the initiative to work overtime to protect school property from damage. (A-51). The union

was never required to submit any evidence to show that it made even a cursory investigation of Galbreath's grievance prior to its decision not to request arbitration.

Although Galbreath was never given a chance for a hearing in the lower tribunals on the issues presented in this statement, the record shows that he raised federal questions at the earliest possible moment. (A-42).

The constitutional issues were not only raised in the initial ULP pleading, they were strenuously argued by Galbreath throughout all appellate levels in the Florida Courts. (A-42-50).

IV. **Decision in the Court of Appeal.** Galbreath has included in the appendix, pertinent excerpts from his briefs and pleadings in the lower courts to show he continued to press his constitutional arguments. The record will show he argued that F.S. §447.401 was unconstitutional on its face and that removal of the duty of fair representation, while maintaining exclusivity, violated the Due Process and Equal Protection Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution. (A-42-50). He also maintained it was inconsistent with Federal Labor Law established by decisions of this Court for the Florida Legislature to remove the duty of fair representation from the union while maintaining exclusivity. Galbreath argued it was a violation of his rights for the school board to prohibit him from going to arbitration with his own legal counsel. It was pointed out that Mr. La Chance's letter specifically suggested that Galbreath determine whether he wanted to pursue the matter on his own. After oral argument the Court of Appeal requested supplemental briefs. After receipt of the briefs the Court issued an opinion

which affirmed PERC'S summary dismissal of the ULP. (A-16). In a motion for rehearing, Galbreath urged the Court to follow the established principle in Florida that public sector employees are entitled to the same rights as private sector employees which includes entitlement to a duty of fair representation for all employees within an exclusive bargaining unit. *City of Tallahassee v. The Public Employees Relations Commission*, 410 So.2d 487 (Fla. 1982). Galbreath argued that F.S. §447.401 is unconstitutional on its face. (A-42-44). The Court of Appeal denied the motion for rehearing without comment.

V. **Decision in the Florida Supreme Court.** In the Florida Supreme Court briefs and oral argument, Galbreath continued to vigorously argue his constitutional claims. (A-44-50). The Court showed substantial concern during oral argument about the union having the final say on the merits of Galbreath's grievance and as to whether he would be allowed access to arbitration. The Court raised questions that showed a concern as to whether a union could meet the requirements of being an impartial decision-maker where a non-dues-paying member of the CBU is involved. This line of inquiry shows the Court was considering the due process and equal protection issues. One of the Justices questioned why the union would want to do anything for a non-dues-paying member. It was pointed out that all Galbreath wanted the union to do was to request arbitration so as not to block him from going to arbitration with his own legal counsel. One of the Justices noted it was not likely to appear on the face of the record when a union refused to represent a non-member due to his non-member status. Despite the intense interest shown during oral argument, the Court, in its opinion, failed

to articulate a reasoned reponse to Galbreath's arguments that F.S. §447.401 was unconstitutional on its face and that Galbreath's constitutional rights to due process and equal protection of the laws under the U.S. Constitution had been violated. The Court also failed to address Galbreath's claim that F.S. §447.401 was inconsistent with Federal Labor Law as established by decisions of this Court and contrary to the Florida Supreme Court's ruling in *The City of Tallahassee* case, supra. The constitutional arguments were dismissed by the Court with the single statement: "We also find Galbreath's constitutional attack on Section 447.401, Florida Statutes (1979), to be without merit." (A-9).

It should be noted the Court specifically endorsed the exclusivity doctrine by adopting *In re: Leon County School Board*, 7 F.P.E.R. ¶12286 (1981). In adopting said case, the Florida Supreme Court endorsed PERC'S conlusion that F.S. §447.401 affords the union the option to determine whether it desires to exercise its right of exclusive representation on behalf of non-members. In a motion for rehearing, Galbreath urged the Court to issue an opinion interpreting F.S. §447.401 in a manner which makes its intent and meaning clear and certain, especially as it relates to Federal Labor Law and rights of due process and equal protection of the law. (A-47-50). It was noted decisions of the U.S. Supreme Court had previously been cited which established that the union in this case could not be an unbiased adjudicator to determine whether Galbreath's case had merit. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973). In *Ward* this Court said: "Petitioner is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61,62. In *Gibson*, this Court said:

> It has also come to be the prevailing view that "[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators". (citations omitted)
>
> 411 U.S. at 579

In the motion for rehearing, Galbreath suggested the union should have the burden of proof that it made a reasonable investigation of his grievance before refusing to request arbitration. Otherwise, it should be assumed the refusal was based upon non-member status and Galbreath should be permitted to go to arbitration with his own legal counsel *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir. 1982) was cited for the principle that "to comply with its duty, a union must conduct some minimal investigation of grievances brought to its attention."

Galbreath argued that F.S. §447.401, on its face, violates the equal protection clause by distinguishing between classes of employees (members and non-members) on a basis which is unrelated to the merits of an employee's grievance. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). (A-50). The Court issued its order on April 5, 1984, denying Galbreath's motion for rehearing, without comment. (A-11). The appeal to this Court followed. (A-13).

VI. **Order of the United States District Court, Southern District of Florida.** In order for this Court to be completely informed as to how Galbreath has pressed his constitutional claims, it is important to comment on his complaint filed in the Federal District Court and the order thereon. Galbreath alleged that F.S. §447.401,

on its face, violated Federal Labor Law, that established the duty of the fair representation doctrine. He also alleged F.S. §447.401 violated his right to due process and equal protection of the laws provided for in the Fifth and Fourteenth Amendments to the U.S. Constitution and his right of redress of his grievance, guaranteed by the First Amendment to the U.S. Constitution. Galbreath invoked jurisdiction of the Federal District Court, Southern District of Florida, pursuant to 42 U.S.C., Sec. 1983, 1985 and 28 U.S.C. Secs. 1331 and 1343. The Federal Court was requested to take pendant jurisdiction to consider the State claims.

The complaint was filed after PERC issued its summary dismissals. At the same time the complaint was filed in Federal Court, Galbreath filed a Notice of Appeal to the State Court of Appeal on PERC's summary dismissal of the ULP charge. This was necessary in order to protect Galbreath's rights in State Court since Sections 447.504 and 120.68 of the Florida Statutes provide that the exclusive method for review of determinations made by PERC is through appellate review by the appropriate Florida District Court of Appeal. Galbreath moved the Florida Court of Appeal to stay the appellate proceedings pending a ruling in the United States District Court. The motion was denied without comment.

On April 24, 1982, the Federal District Court issued an eight-page order granting Defendants' motions to abstain and dismissing the cause without prejudice. In the abstention order, the Court pointed out that F.S. §447.401 had not been specifically construed or interpreted by Florida Courts in a manner which makes its intent and meaning clear and certain. It should be noted F.S. §447.401 was amended by the Florida Legislature in

1977 to provide that certified employee organizations shall not be required to process grievances for employees who are not members of the organization. Apparently the Federal Judge wanted to give the State Court the first opportunity to reconcile said proviso with the U.S. Constitution and National Labor Policy. The State Court did not comply with the Federal Court's suggestion in that it failed to articulate any rational basis for allowing such a proviso to pass constitutional muster.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Removal of the duty of fair representation while retaining exclusive right to represent strikes at the very heart of due process and equal protection rights. To the knowledge of counsel for Galbreath, Florida is the only State in the United States that grants exclusive representational rights to a labor organization while at the same time, in another section of the same statute, it removes the duty of fair representation to a certain class of employees covered by the certified bargaining unit. Such a statute is unconstitutional on its face and violates the due process and equal protection clauses of the U.S. Constitution. The statute is also inconsistent with Federal Labor Law and completely contrary to the quid-pro-quo requirement for grant of exclusivity which has been consistently supported in decisions of this Court.

The importance of the questions presented in this appeal are underscored by a recent Law Review article written by Dennis O. Lynch, Associate Dean and Professor of Law at the University of Miami School of Law. Although the article appears in the May-September,

1983 issue of the Law Review, it was not actually published and available for citation until after the Florida Supreme Court issued its decision in the *Galbreath* case. The article focuses on Section 447.401 of the Florida Statutes and the amendment thereto which allows a union to refuse to process a non-member's grievance to arbitration. Lynch, *Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law.* 37 U.Miami L.Rev.573 (1983).

The author raises a number of due process questions including the question as to whether the grievance procedure is structurally biased where the union negotiates the procedure that a non-member must use but the union has been given statutory authority to refuse to represent the non-member. Lynch P.614-618. With further reference to the issue of due process, the author questions whether the union can be an unbiased adjudicator in making a decision on the merits of grievances of non-dues paying members of the certified bargaining unit. Lynch P.629.

In reviewing the handling of Galbreath's case by PERC and The Florida Courts, Dean Lynch noted PERC did not require the union to provide any justification for its decision that the grievance lacked merit. Lynch P.637. He pointed out the documents submitted to PERC with the ULP charge included a letter from the school principal, acknowledging that Galbreath might have been negligent had he not taken the initiative to work overtime to protect school property from damage. Lynch P.630. (A-51). Dean Lynch also noted the Court of Appeal did not even discuss the fair representation issues raised in the ULP charge against the union, but instead the Court only addressed the issue raised by the charge

against the school board. He stated: "In cases such as *Galbreath*, it often is difficult for the employee to provide additional factual support for an allegation of union bias. The issue is essentially one of motive, and the decision-maker has mixed incentives." Lynch P.632. It was pointed out that the situation of a non-union member in a fair representation case is closer to Title VII cases where the U.S. Supreme Court has shifted the burden of production of evidence to the defendant, once the plaintiff has made a prima facie case of discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252, 253 (1981)

Galbreath argued below that the burden should be placed upon the union to present evidence that it made at least a cursory investigation of his grievance before making a determination it lacked merit. The summary dismissal prevented Galbreath from utilizing discovery to require production of evidence to show that the real motivation for the union's refusing to request arbitration was his non-member status. Common sense dictates that the union could have no other motive for refusing to simply request arbitration after Galbreath informed the union he would be represented by his own legal counsel. As noted by Dean Lynch, PERC did not require the union to produce any evidence despite the fact the pertinent clause of the contract provided for compensation for any "excess assignment at the employee's hourly rate". He pointed out the issue was one of past practice and contract interpretation in the sense of whether this clause only meant prior authorized assignments or also overtime work growing out of an employee's normal assignment, when the overtime was necessary to protect school property. He said Galbreath claimed (a) that his grievance raised a question of past practice and contract

interpretation, (b) that it was denied as unmeritorious, and (c) that his status as a non-member prompted the denial. Dean Lynch suggested that at this point the burden could have been shifted to the union to produce evidence of a thorough investigation of Galbreath's grievance and of substantive reasons for denying it. Lynch, P.636.

In another Law Review article which focuses upon the constitutional nature of the duty of fair representation. author William C. Bryson stated that *Steele v. Louisville & Nashville R.R.*, held that it would be constitutionally impermissible for Congress to delegate as much power to the unions as it did in the National Labor Relations Act, without granting individual union members a judicially enforceable right to freedom from union discrimination. The author stated:

> . . . at several points in the opinion the Court came very close to holding that the right of the employee to fair representation is a constitutional right, or is at least indistinguishable in its degree of protection from a constitutional right. At the very least, *Steele* seems to place a serious obstacle in the way of congressional or judicial abolition of the duty of fair representation. Although the Court expressly looked to the statute to find the implied duty of fair representation, it would ignore the heavy constitutional overtones of the case to assume that the right can be eliminated from the statute without raising constitutional problems. Bryson P.1091, 1092

The Author quoted from *Steele*, where this Court stated:

> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an *affirmative constitutional duty* equally to protect those rights . . .
>
> We think that the Railway Labor Act imposes upon the statutory representative of a craft *at least as exacting a duty to protect equally the interests of the members of a craft as the Constitution imposes upon a legislature to give equal protection* to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty. (emphasis added).
>
> 323 U.S. at 198, 202.

The author concluded the *Steele* case and its progeny at least teaches that the duty of fair representation protects a particularly important right—one that should not be dismissed easily. Bryson, *A Matter of Wooden Logic: Labor Law, Preemption and Individual Rights*,

51 Tex.L.Rev. 1037 (1973). In *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. NLRB*, 368 F.2d 12, 17, 18 (5th Cir. 1966), the Fifth Circuit also citing *Steele* stated the U.S. Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation. The Fifth Circuit noted that even if the act provides that an individual employee may present his claim directly to the employer, it does not diminish the union's duty of fair representation.

Despite the conclusion that Galbreath's constitutional attack against F.S. §447.401 had no merit, neither the Florida Supreme Court nor the Court of Appeals cited a single case or even discussed how it distinguished this case from the numerous decisions of this Court on the quid-pro-quo principle, that a duty of fair representation is required in exchange for exclusivity. They also failed to discuss how the different treatment of members and non-members could pass constitutional muster in light of the equal protection clause.

Both Courts adopted PERC'S ruling in the *In re Leon County School Board* case, *supra*. The problem with PERC'S position on the exclusivity issue is that PERC holds that a union can waive its right of exclusivity if it elects not to process a non-member's grievance based upon the grievant's non-membership status. PERC did not cite a single authority for this far-reaching conclusion that a union can waive its exclusive representation coverage which is specifically defined by statute.

PERC and the Florida Courts have misapprehended the nature of the duty of fair representation and they erred in holding that a union given a statutory exclusive right to represent, can waive its duty of fair representation to someone included in the certified bargaining unit. Such has never been the status of the law throughout this land and it does not make common sense, given the power of labor unions, that a union should be extended statutory rights of exclusive representation over a group of employees, but then be permitted to choose not to represent certain individuals included in the group. This is precisely the kind of circumstances this Court meant to prevent with its decisions in *Vaca v. Sipes, supra; Steele v. Louisville & Nashville R.R., supra; NLRB v. Allis-Chalmers Mfg Co., supra; Abood v. Detroit Board of Education, supra.*

The duty of fair representation doctrine has evolved from federal law and it stands as a fundamental right under national labor policy. In *Bowen v. United States Postal Service*, ____ U.S. ____, 103 S.Ct.588 (1983) this Court stated that it has ". . . applied an evolving federal common law grounded in national labor policy." In discussing the grievance procedure, this Court said: ". . . the union plays a pivotal role in the process since it assumes the responsiblity of determining whether to press an employee's claims. . . . By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes a corresponding duty to discharge that responsibility faithfully—a duty which it owes to the employees whom it represents. . ." In citing *Vaca* this Court noted that when the union has the sole power under the contract to invoke the higher stages of the grievance procedure, the Court faces a

strong countervailing interest; the employee's right to vindicate his claim.

The U.S. Supreme Court in the 1977 Term gave specific support to the concept of exclusive union representation in the public sector. *Abood, supra.* In another law review article *Abood* has been cited for authority that "The Supreme Court has held, that, as in the private sector, unions representing public employees have the right to act as exclusive agents for the members and also have the duty of fair representation." Mack & Singer, *Florida Public Employees: Is The Solution to the Free Rider Problem Worse Than the Problem Itself?* 6 Fla. State L.Rev. 1347, 1359 (1978). This article also focuses on the problems presented by F.S. §447.401. The authors conclude that the United States Supreme Court has given constitutional dimension to the duty of fair representation. The authors also concluded that states which enact right-to-work laws do not have authority to alter the principles of union exclusivity. Consequently, the duty-of-fair-representation doctrine, as enumerated in *Steele, supra*, remains applicable in right-to-work states. Mack & Singer P. 1356. Concerning the constitutionally of F.S. §447.401, the authors had this to say:

> The effect of section 447.401 thus, is to cut off nonunion members from any meaningful access to the grievance procedure. This is a clear violation of the union's constitutional duty of fair representation, for nonunion members are treated unequally even though exclusivity is maintained. While the legislature's intent in enacting the amendment may have been

laudable, it must be struck by the courts because the effect violates individual rights.

It is clear the duty of fair representation is applicable to Florida public employees *Gow v. American Fed'n of State, County and Municipal Emloyees, Local 1363*, 4 F.P.E.R. ¶4168 (1978). It should be noted in the *Gow* case PERC looked to the NLRA and federal case law and concluded: "The privilege of exclusive representation granted by Section 447.307 requires the correlative duty of fair representation of *all unit employees*". (emphasis added). Despite its conclusion in *Gow*, PERC now holds that a union can waive its correlative duty of fair representation to non-dues-paying members of the CBU.

There is no rational basis for the Florida Legislature to extend the union's exclusive right to represent to a class of employees that the union has no corresponding duty to represent. Such a distinction between a member and non-member violates the equal protection clause by distinguishing between classes of employees on a basis which is unrelated to the merits of an employee's grievance. The classification is arbitrary and irrational. *Logan v. Zimmerman Brush Co., supra.* This case is discussed in Dean Lynch's article beginning on Page 614. He compares the classification scheme in *Logan* which was held to violate equal protection, with the classification scheme under F.S. §447.401. He notes that an employee's membership or non-membership in the union has the potential to cause identical claims to be treated very differently in terms of the fairness of the hearing they receive. When this court applies The *Logan* Principles to the case at bar it will be obvious

that F.S. §447.401 is invalid on its face as being repugnant to the equal protection clause.

This Court has held that it has the power to review a contention that a state statute is invalid on its face, as being repugnant to federal law. *Bantam Books, Inc., v. Sullivan, supra.* Galbreath also maintains that the statute, on its face, presents a *prima facie* case of violation of the union's duty of fair representation in that a failure to process the grievances of both union and non-union members, equally, is a breach of duty of fair representation. To the knowledge of the attorney for Galbreath, this is the first case brought before this Court which raises the substantial federal question of whether a state legislature can maintain a union's exclusive right to represent while specifically removing, by statute, the union's duty of fair representation to a certain class of employees within the certified bargaining unit. The question involves fundamental principles of Federal Labor Law, due process and equal protection. Even though the Court of Appeal failed to address the constitutional issues, there was no reason for the Florida Supreme Court not to address the issues raised by Galbreath. It is well settled that once the Florida Supreme Court accepts jurisdiction, it will review the entire record, rather than limit its review to the certified question. *Lawrence v. Florida East Coast R.Co.*, 346 So.2d 1012, 1014 (Fla. 1977). The very nature of the questions raised by the Justices during oral argument shows that the federal issues were considered but the basis for finding F.S. §447.401 constitutional was not articulated in the decision.

Galbreath respectfully maintains that this case presents substantial questions of great public importance

and this Court has jurisdiction of the issues under 28 U.S.C. §1257(2). However, if this Honorable Court is not satisfied that it has jurisdiction on appeal, it is respectfully submitted that this case is nonetheless properly before the Court, since the questions presented herein are of substantial federal import and the papers upon which the appeal is predicated can be considered as a petition for certiorari pursuant to 28 U.S.C. §2103. *Commonwealth of Pennsylvania v. City of Philadelphia*, 353 U.S. 230 (1957).

CONCLUSION

The issues raised by this appeal relate to the heart of the Duty of Fair Representation and Exclusivity Doctrine. In upholding the constitutionality of F.S. §447.401, the Florida Supreme Court ignored prior decisions of this Court which establish National Labor Law Policy. The decision also ignored Galbreath's fundamental rights to due process and equal protection of the laws provided for in the U.S. Constitution. The federal questions presented by this appeal are indeed substantial and we urge this Court to note probable jurisdiction in order that plenary consideration, on the basis of briefs on the merits, and oral argument, may be given to resolve the issues herein. In the event this Court concludes that F.S. §447.401 is invalid on its face and that briefing and oral argument is not necessary to that determination, it is respectfully requested the decision of the Florida Supreme Court be summarily reversed and this case be returned to the State Court with instructions to:

1. Provide Galbreath an evidentiary hearing on his Breach of Duty of Fair Representation Claim against the Union and his Unfair Labor Practice Charge against the School Board.

2. Permit Galbreath to proceed to arbitration with his own legal counsel.

3. Assess statutory attorney's fees and costs in favor of Galbreath.

Respectfully submitted,

LAW OFFICES
HAROLD D. SMITH, P.A.
P.O. Box 1780
Hollywood, Florida 33022
Telephone: 305-923-6500

BY: _____
HAROLD D. SMITH

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on , 1984, pursuant to Supreme Court Rule 33, three copies of the foregoing Jurisdictional Statement were mailed to: JIM SMITH, Attorney General, State of Florida, The Capitol, Tallahassee, Fl. 32301; GORDON DEAN ROGERS, ESQ., Muller, Mintz, Kornreich, Caldwell & Casey, P.A. Attorneys for School Board, One Biscayne Tower, Suite 1800, Two Biscayne Boulevard, Miami, Fl. 33131; MARK F. KELLY, ESQ., Frank & Kelly, P.A., Attorneys for Classroom Teachers Association, 341 Plant Avenue, Tampa, Fl. 33606; and PHILLIP P. QUASCHNICK, ESQ., General Counsel, Public Employees Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, Florida 32301.

HAROLD D. SMITH
Counsel for Appellant

Appendix

Appendix A

Opinion of Florida Supreme Court

Supreme Court of Florida

NO. 63,203

RUEL A. GALBREATH,

Petitioner,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, et al.,

Respondents.

[January 26, 1984]

McDONALD, J.

This case is before us to review a district court decision, *Galbreath v. School Board of Broward County*, 424 So.2d 837 (Fla. 4th DCA 1982), which certified the following question as being of great public importance:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the dispute if the grievant submits it to

> arbitration because the certified bargaining agent has declined to "represent the grievant?

Id. at 838. This Court has jurisdiction under article V, section 3(b)(4) of the Florida Constitution. We answer the certified question in the negative and approve the decision under review.

Ruel Galbreath is a public school teacher in Broward County. His employer, the School Board of Broward County, and the Broward County Classroom Teachers Association are parties to a collective bargaining agreement. This agreement covers all teachers including those who, like Galbreath, are not members of the Classroom Teachers Association. Galbreath filed a grievance under the collective bargaining agreement in an attempt to secure payment for certain overtime work. The Classroom Teachers Association represented Galbreath through the first two steps of the three-step grievance procedure but refused to further process his grievance through the final arbitration step. The Classroom Teachers Association based this decision not on Galbreath's non-union status but rather on the lack of merit in his grievance. The school board then rejected Galbreath's demand for arbitration because the collective bargaining agreement gave control over the arbitration step to the Classroom Teachers Association. Galbreath subsequently brought unfair labor practices charges with the Public Employees Relations Commission against both the school board and the Classroom Teachers Association. The Public Employees Relations Commission summarily dismissed these charges and Galbreath appealed.

The district court affirmed the dismissal, holding that Galbreath could be foreclosed from individual arbitration under section 447.401, Florida Statutes (1979). In affirming, the district court adopted the majority opinion of the Public Employees Relations Commission in *Heath v. School Board of Orange County*, 5 FPER 10074 (1979), and the "Declaratory Statement" portion of *In re Leon County School Board*, 7 FPER 12286 (1981). We agree with the district court and approve the following portions of *In re Leon County School Board*, set out in the appendix of the opinion under review, as dispositive of the issues presented in the certified question.

> A union's right to exclusivity over the administration of a collective bargaining agreement includes not only the right to settle a grievance short of arbitration, but also the right to decline to process a grievance when it believes the grievance lacks merit. In either case, the union is deemed to have *represented* the grievant even though the grievance was not pursued to the final stage of the procedure, binding arbitration. Once the bargaining agent chooses to represent a grievant, regardless of the grievant's union membership status, the manner with which it handles the grievance, including a decision not to process the grievance for lack of merit, is subject to the statutory duty of fair representation. See *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979); *Gow v. AFSCME*, Local 1316, 4 FPER ¶4168 (1978).

However, unlike other jurisdictions, Florida law permits a certified bargaining agent to refuse to represent a grievant who is not a member of the certified organization. Section 447.401, Florida Statutes (1979), provides, in pertinent part:

> All public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, *except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization.* (Emphasis added)

The Commission has concluded that this provision does not serve as a limitation upon the certified bargaining agent's exclusive right of representation. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 92. Rather, the proviso simply affords the organization the right to determine whether it desires to exercise its right of exclusive representation on behalf of nonmembers.

When a certified bargaining agent declines to represent a grievant because he or she is not a member of the certified organization, the grievant is entitled to pursue the grievance to arbitration, and the public employer is under a concomitant obligation to process the grievance in accordance with the terms set forth in the agreement. *See generally, Blanchett v. School Board of Leon County*, 378 So.2d 68 (Fla. 1st

DCA 1979); *Manatee County Municipal Employees Local 1584 v. Manatee County School Board*, 6 FPER ¶11188 (1980). Therefore, the grievant's right to a fair and equitable grievance procedure mandated by Section 447.401 is protected by allowing the grievant to either represent himself or to seek outside representation, for the purpose of pursuing the grievance in accordance with the procedures set forth in the collective bargaining agreement.

. . . Our rejection of the proposition that Section 447.301(4) *guarantees* an individual unfettered access to the arbitral process is supported by the substantial weight of authority in other jurisdictions interpreting statutory provisions which are identical in all material respects to Section 447.301(4) in both language and policy. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 91-93; *Maggs v. PLRB*, 11 PPER. ¶11103 (Pa.Comm.Ct. 1980). . . .[W]e find it patently illogical that the Legislature would have adopted practically verbatim the language of a long standing federal statute but have intended an interpretation which is exactly the opposite of the interpretation given the federal statute as long ago as 1944. As we have previously noted, the policy considerations which underlie the interpretation of the federal statute apply with equal force to the Florida public sector collective bargaining scheme.

It is inconsistent to require, on the one hand, an exclusive bargaining agent to fairly

represent all bargaining unit employees in collective bargaining negotiations and administration of a collective bargaining agreement and, on the other hand, to allow individual employees to advance grievances which may assert an interpretation of that agreement contrary to that of the bargaining agent and possibly the employer. Under such a scheme, the bargaining agent's status as exclusive representative in the determination of wages, hours and terms and conditions of employment is emasculated because the employer would be required to process through arbitration every individual grievance upon request, regardless of merit. Such individual grievance processing is in effect individual negotiations between the employer and the employee regarding the subject matter of the grievance. The Florida courts have long recognized the inherently destructive effect that individual negotiations between employer and employees have upon the right to collectively bargain. *Pasco County School Board v. PERC*, 353 So.2d 108, 4 FPER ¶4033 (Fla. 1st DCA 1977). Such individual negotiations are no less destructive simply because they occur during the grievance process rather than at the negotiating table.

There are also important practical reasons for limiting access to the arbitration machinery of contractual grievance procedures. Unlimited individual access would allow every employee, regardless of motive, to compel arbitration proceedings where the parties who negotiated

the collective bargaining agreement deemed such proceedings unwarranted. The potential for harassment of the union and the employer, to the detriment of all concerned, from disgruntled individuals is very real. *See e.g., Black-Clawson Co., Inc. v. International Association of Machinist, Lodge 355*, 313 F.2d 179, 196 (5th Cir. 1962). Furthermore, one need not be very experienced in labor relations to realize the attractiveness to a rival or a minority union of being able to compete with the incumbent union for [members] by indirectly processing grievances, regardless of merit, through an individual member. *See McGuire Public Employee Collective Bargaining In Florida—Past, Present and Future*, Fla.State L.Rev. 26, 101-02 (1973).

Finally, the policy we have adopted protects the taxpayer from the compulsory but unnecessary expenditures of public funds, a policy consideration not present in the private sector. If individual employees may, at their whim, compel arbitration of all grievances regardless of merit and contrary to the desires of the employer and the bargaining agent, significant public funds will be spent on expensive arbitration proceedings which would otherwise not be expended. The parties to the collective bargaining agreement would therefore have less funds available for truely [sic] meritorious grievances and the employer might be compelled to settle non-meritorious grievances contrary to a reasonable interpretation of the collective bargaining agreement to avoid

expense, thereby establishing an erroneous precedent applicable to subsequent grievances. The interference with the statutory goal of promoting harmonious and cooperative relationships between the government and its employees who have chose to bargain collectively . . . is accurately summarized by the following language from *Vaca v. Sipes*, 386 U.S. at 191-92, 87 S.Ct. at 917-18:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

. . . the Commission's decision in *Heath* does not stand for the proposition that an individual has the unfettered right to advance a grievance through the contractual grievance procedure once the certified bargaining agent has exercised its exclusive right to discontinue processing the grievance based upon its good faith determination that the grievance lacks

> merit. As the above discussion demonstrates, such a conclusion is the antithesis of the concept of exclusiv[it]y embraced by our decision in *Heath.* 5 FPER ¶10074 at 92. Accordingly, where the parties[']collective bargaining agreement reserves to the certified bargaining agent the exclusive right to submit grievances to arbitration, a public employer is not obligated to process an individual's grievance to arbitration if the certified bargaining agent has declined to advance the grievance because of its belief that the grievance lacks merit. Indeed, if the public employer does process such a grievance to arbitration at the individual's request it might well violate Section 447.501(1)(a), (c), Florida Statutes (1979). Such action could constitute circumvention of the bargaining agent and a unilateral alteration of the contractual grievance procedure. *Leon County CTA v. Leon County School Boa[illegible]*, 6 FPER ¶11001 at 4.

424 So.2d at 841-43 (footnotes omitted, emphasis added by fourth district).

We therefore answer the certified question in the negative. We also find Galbreath's constitutional attack on section 447.401, Florida Statutes (1979), to be without merit. Accordingly, we approve the decision under review.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, EHRLICH and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Certified Great Public Importance

Fourth District – Case No. 81-1394

Harold D. Smith, Hollywood, Florida,

for Petitioner

Gordon Dean Rogers of Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, Miami, Florida,

for Respondent, The School Board of Broward County, Florida

Richard H. Frank, Mark F. Kelly and Richard T. Donelan, of Frank & Kelly, Tampa, Florida,

for Respondent, The Broward County Classroom Teachers Association, Inc.

Phillip P. Quaschnick, Deputy Assistant General Counsel, Tallahassee, Florida,

for Respondent, Public Employees Relations Commission

Appendix B

IN THE SUPREME COURT OF FLORIDA
THURSDAY, APRIL 5, 1984

CASE NO. 63,203
District Court of Appeal,
4th District—No. 81-1394

RUEL A. GALBREATH,

Petitioner,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, et al.,

Respondents.

The Motion for Rehearing and Reconsideration filed by attorney for petitioner is hereby denied.

The Motion to Strike filed by attorney for respondent, the Broward County Classroom Teachers Association, Inc., is hereby denied.

The Motion for Attorney's Fees filed by attorney for petitioner is hereby denied.

The Motion for Attorneys Fees filed by attorney for respondent, the Broward County Classroom Teachers Association, Inc., is hereby denied.

C

cc: Hon. Clyde L. Heath, Clerk
Harold D. Smith, Esquire
Mark F. Kelly, Esquire
of Frank & Kelly
Philip P. Quaschnick, Esquire
Gordon Dean Rogers, Esquire
of Muller, Mintz, Kornreich,
Caldwell, Casey, Crosland
& Bramnick

A True Copy

TEST

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

Appendix C

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 63,203
4th DCA CASE NO. 81-1394
PERC CASE NO. CA 81-007
CA 81-027

RUEL A. GALBREATH,

Appellant/Petitioner,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC., and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees/Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RUEL A. GALBREATH, the Appellant/Petitioner above named, hereby appeals to the Supreme Court of the United States from the Final Judgment of the Florida Supreme Court, rendered on January 26, 1984, and the Order dated April 5, 1984 denying Petitioner's Motion for Rehearing and Reconsideration and denying Petitioner's Motion for Attorney's Fees.

This Appeal is taken pursuant to 28 U.S.C. §1257(2). 28 U.S.C. §2403(b) may be applicable in this Appeal and a copy of this Notice is served upon the Attorney General of the State of Florida, pursuant to Supreme Court Rule 28.4(c).

LAW OFFICES
HAROLD D. SMITH, P.A.
P.O. BOX 1780
Hollywood, Florida 33022
Telephone: 305-923-6500
Attorney for Appellant/Petitioner

By: _____
HAROLD D. SMITH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 1984, pursuant to Supreme Court Rule 28, the foregoing Notice of Appeal was served on the following in the manner indicated:

SID J. WHITE, Clerk of the Supreme Court Supreme Court Building, Tallahassee, Fl 32301 by delivering the original to Purolator Courier Service, Fort Lauderdale, Florida, for delivery by Courier Service.

CLYDE L. HEATH, Clerk of the Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., P.O. Box A, West Palm Beach, FL 33402, by copy deposited with the U.S. Postal Service for delivery by regular mail.

JIM SMITH, Attorney General, State of Florida, The Capitol, Tallahassee, FL 32301, by copy deposited with the U.S. Postal Service for delivery by regular mail.

Gordon Dean Rogers, Esq.
Muller, Mintz, Kornreich, Cladwell,
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Attorneys for School Board
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Phillip P. Quaschnick, Esq.
Deputy Assistant General Counsel
Public Employees Relations Commission
2600 Blair Stone Road, Suite 300
Tallahassee, Florida 32301 by copy deposited with the U.S. Postal Service for delivery by regular mail.

/s/ _____
HAROLD D. SMITH, P.A.

Appendix D

IN THE DISTRICT COURT OF APPEAL
IN THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1982

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

CASE NO. 81-1394.

RUEL A. GALBREATH,

Appellant,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC.,

and

THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

Opinion filed November 17, 1982

Appeal from the State of Florida,
Public Employees Relations Commission.

Harold D. Smith, Hollywood, for appellant.

Gordon Dean Rogers of Muller, Mintz, Kornreich, Caldwell & Casey, P.A., Miami, for appellee, School Board of Broward County, Florida.

Richard H. Frank, Mark F. Kelly, and Francis M. Kinsey, Law Offices of Frank & Kelly, P.A., Tampa, for appellee, The Broward County Classroom Teachers Association, Inc.

Phillip P. Quaschnick, Deputy Assistant General Counsel, Tallahassee, for appellee, Public Employees Relations Commission.

BERANEK, J.

Appellant seeks reversal of summary dismissals of his unfair labor practice charges filed against The School Board of Broward County and the Broward County Classroom Teachers Association before the Public Employees Relations Commission. The Commission summarily dismissed appellant's charges. We affirm.

Appellant is a public school teacher in the Broward County school system. He is not a member of the Broward County Classroom Teachers Association, which is an employee organization under Chapter 447, Florida Statutes. The Classroom Teachers Association and the School Board are parties to a collective bargaining agreement governing the teachers of Broward County. Appellant filed a grievance claiming that he had not been properly paid for certain overtime work. The Classroom Teachers Association refused to process appellant's grievance through the arbitration step

provided for in the collective bargaining agreement. The agreement gave the certified bargaining agent control over the final arbitration step in the three step grievance procedure. The Classroom Teachers Association found that appellant's grievance lacked merit and refused to process it through the arbitration stage. The union did not base its refusal on appellant's nonunion status. Appellant was thereby foreclosed from arbitration and filed an unfair labor practice charge with the Public Employees Relations Commission which summarily dismissed the charge. The present appeal results.

Although numerous issues are raised, we conclude that only one presents arguable merit. Appellant contends that he cannot be legally foreclosed from arbitration under Section 447.401, Florida Statutes (1979). This precise question was presented and decided adversely to appellant in *Heath v. School Board of Orange County*, 5 FPER 10074 (1979), and *In Re Leon County School Board*, 7 FPER 12286 (1981). The question, simply put, is whether a union may refuse to process nonunion public employees' grievances through the arbitration stage of the statutorily required grievance procedures prescribed by Section 447.401, Florida Statutes (1979). In the case of *In Re Leon County School Board*, 7 FPER 12286 (1981), the Commission stated the question as follows:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the dispute if the grievant submits it to

arbitration because the certified bargaining agent has declined to "represent" the grievant?

The Commission answered this question in the negative in an opinion which is produced verbatim herein.[1]

Substantially the same question was discussed at length in the majority and dissenting opinions filed by the Commission in *Heath v. School Board of Orange County, supra.* The views expressed in the *Heath* majority opinion and in the later "Declaratory Statement" in the *Leon County School Board* case are hereby adopted by this Court in our present affirmance of the summary dismissal of appellant's unfair labor practice charges.

Deeming the above stated question to be of great public importance, we answer it in the negative and certify same to the Supreme Court.

AFFIRMED.

DOWNEY and ANSTEAD, JJ., concur.

1. Leon County School Board
Decision of PERC
In re Petition for Declaratory Statement of the School Board of Leon County.

Case No. DS-81-001, 81D-238
June 26, 1981

Before Powers, Chairman; Parrish and Brooks, Commissioners

DECLARATORY STATEMENT

POWERS, Chairman. On February 5, 1981, the School Board of Leon County filed a petition for declaratory statement[1] pursuant to Section 447.207(7), Florida Statutes (1979), and Florida Administrative Code Rule 38D-22.02. Notice of the petition was published in the Florida Administrative Weekly on March 6, 1981, in compliance with Section 120.565, Florida Statutes (1979).

On March 26, 1981, both the Leon County Classroom Teachers Association, FTP/NEA (LCTA or Association) and the Florida Education Association/United, AFT, AFL-CIO, (FEA) filed memoranda in support of their respective positions.

The School Board requests that the Commission answer the following questions:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the disute if the grievant submits it to arbitration because the certified bargaining agent has declined to "represent" the grievant?
>
> Does the answer to the above question depend on whether or not the grievant is a member of the certified bargaining agent? If so, how?

According to the petition, the LCTA is the certified bargaining agent for a unit of instructional employees employed by the School Board of Leon County. The grievance procedures set forth in Article VI of the current collective bargaining agreement between the LCTA and the School Board allows all instructional employees to file a grievance at Step I, but reserves to the LCTA the exclusive authority to advance the grievance to Steps II, and III, the latter step being the arbitration provision.[2]

On September 30, 1980, Freddie O. Hadley, an instructional employee within the certified bargaining unit who is not a member of the LCTA, individually filed a grievance against the School Board asserting that she did not receive a timely payment of her monthly salary as required by the terms of the collective bargaining agreement. After Hadley's supervisor denied the grievance at Step I, the LCTA intervened at Step II of the grievance procedure and submitted her grievance to the Director of Employee Relations, the Superintendent's designee. On November 18, 1980, the Director denied the grievance.

By letter dated December 2, 1980, the LCTA informed Hadley of its decision not to submit her grievance to arbitration. The letter advised the grievant, in pertinent part, that:

> Based on advice from General Counsel, LCTA has decided not to process your grievance to arbitration. In both his opinion and mine, the contract has not been violated as set forth in your grievance.

* * *

> Ms. Hadley, I feel that I must express one final thought in this letter. LCTA is taking exactly the same care with your grievance as we do with the grievances of our members, who pay their dues to provide for *all* teachers (emphasis in original).

On December 12, 1980, Hadley advised the School Board of her intent to individually submit the grievance to arbitration. The grievant thereafter filed a demand for arbitration with the American Arbitration Association.

Resolution of the questions presented requires an examination of the Commission's decisions in *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979) and *Leon County CTA v. Leon County School Board*, 6 FPER ¶11001 (1979). In *Heath*, the Commission concluded that the Orange County School Board did not unlawfully refuse to process a grievance by failing to arbitrate a grievance brought by an individual employee where the collective bargaining agreement provided that grievances could be submitted to arbitration only by the certified bargaining agent. Similarly, in *Leon County CTA*, the Commission determined that the School Board violated Section 447.501(1)(a), (c) and (f), Florida Statutes (1979), by processing individual employee grievances to arbitration in derogation of the collective bargaining agreement which provided that only the LCTA could submit grievances to arbitration.

The underlying rationale in both cases turned upon the well-established principal of exclusive representation embodied in Section 447.301(3)(b), Florida Statutes (1979), which provides, in pertinent part, that the certified agent shall act as "the exclusive collective bargaining

representative of all employees in the unit." The principle of exclusivity, as the Commission recognized in *Heath*, is essential to the advancement of labor stability:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

5 FPER ¶10074 at 91, *quoting from Abood v. Detroit Board of Education*, 431, U.S. 209 (1977).

The Commission also recognized in *Heath* that the determination of terms and conditions of employment does not end when the parties enter into a collective bargaining agreement. Rather, the interpretation of the agreement through the grievance arbitration procedure may also have a significant impact on the unit employees' terms and conditions of employment. The principle of exclusivity applies not only to the negotiation of a collective bargaining agreement but also the the administration of the agreement through the grievance-arbitration procedure. 5 FPER ¶10074 at 91. Consequently, a certified bargaining agent may negotiate a provision whereby it retains ultimate control over the grievance-arbitration machinery. In reaching

this policy determination in *Heath* we found the rationale enunciated by the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 191 (1969), particularly compelling:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement.

A union's right to exclusivity over the administration of a collective bargaining agreement includes not only the right to settle a grievance short of arbitration, but also the right to decline to process a grievance when it believes the grievance lacks merit.[3] In either case, the union is deemed to have *represented* the grievant even though the grievance was not pursued to the final stage of the procedure, binding arbitration. Once the bargaining agent chooses to represent a grievant, regardless of the grievant's union membership status,

the manner with which it handles the grievance, including a decision not to process the grievance for lack of merit, is subject to the statutory duty of fair representation. See *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979); *Gow v. AFSCME*, Local 1316, 4 FPER ¶4168 (1978).

However, unlike other jurisdictions, Florida law permits a certified bargaining agent to refuse to represent a grievant who is not a member of the certified organization. Section 447.401, Florida Statutes (1979), provides, in pertinent part:

> All public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, *except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization.* (Emphasis added)

The Commission has concluded that this provision does not serve as a limitation upon the certified bargaining agent's exclusive right of representation. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 92. Rather, the proviso simply affords the organization the right to determine whether it desires to exercise its right of exclusive representation on behalf of non-members.

When a certified bargaining agent declines to represent a grievant because he or she is not a member of the certified organization, the grievant is entitled to pursue the grievance to arbitration, and the public employer is under a concomitant obligation to process

the grievance in accordance with the terms set forth in the agreement. *See generally, Blanchett v. School Board of Leon County*, 378 So.2d 68 (Fla. 1st DCA 1979); *Manatee County Municipal Employees Local 1584 v. Manatee County School Board*, 6 FPER ¶11188 (1980). Therefore, the grievant's right to a fair and equitable grievance procedure mandated by Section 447.401 is protected by allowing the grievant to either represent himself or to seek outside representation, for the purpose of pursuing the grievance in accordance with the procedures set forth in the collective bargaining agreement.

FEA's argument on this point is based upon an interpretation of Section 447.301(4), Florida Statutes (1979), which we expressly rejected in *Heath*. Our rejection of the proposition that Section 447.301(4) *guarantees* an individual unfettered access to the arbitral process is supported by the substantial weight of authority in other jurisdictions interpreting statutory provisions which are identical in all material respects to Section 447.301(4) in both language and policy. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 91-93; *Maggs v. PLRB*, 11 PPER ¶11103 (Pa. Comm. Ct. 1980). We therefore decline the FEA's implicit invitation to recede from our previous interpretation of Section 447.301(4) because we find it patently illogical that the Legislature would have adopted practically verbatim the language of a long standing federal statute but have intended an interpretation which is exactly the opposite of the interpretation given the federal statute as long ago as 1944.[4] As we have previously noted, the policy considerations which underlie the interpretation of the federal statute apply with equal force to the Florida public sector collective bargaining scheme.

It is inconsistent to require, on the one hand, an exclusive bargaining agent to fairly represent all bargaining unit employees in collective bargaining negotiations and administration of a collective bargaining agreement and, on the other hand, to allow individual employees to advance grievances which may assert an interpretation of that agreement contrary to that of the bargaining agent and possibly the employer. Under such a scheme, the bargaining agent's status as exclusive representative in the determination of wages, hours and terms and conditions of employment is emasculated because the employer would be required to process through arbritration every individual grievance upon request, regardless of merit. Such individual grievance processing is in effect individual negotiations between the employer and the employee regarding the subject matter of the grievance. The Florida courts have long recognized the inherently destructive effect that individual negotiations between employer and employees have upon the right to collectively bargain. *Pasco County School Board v. PERC*, 353 So. 2d 108, 4 FPER ¶4033 (Fla. 1st DCA 1977). Such individual negotiations are no less destructive simply because they occur during the grievance process rather than at the negotiating table.[5]

There are also important practical reasons for limiting access to the arbitration machinery of contractual grievance procedures. Unlimited individual access would allow every employee, regardless of motive, to compel arbitration proceedings where the parties who negotiated the collective bargaining agreement deemend such proceedings unwarranted. The potential for harassment of the union and the employer, to the detriment of all concerned, from disgruntled individuals is very real.

See e.g., Black-Clawson Co., Inc. v. International Association of Machinist, Lodge 355 , 313 F.2d 179, 196 (5th Cir. 1962). Furthermore, one need not be very experienced in labor relations to realize the attractiveness to a rival or a minority union of being able to compete with the incumbent union for by indirectly processing grievances, regardless of merit, through an individual member. *See McGuire Public Employee Collective Bargaining In Florida — Past, Present and Future*, Fla. State L. Rev. 26, 101-02 (1973).

Finally, the policy we have adopted protects the taxpayer from the compulsory but unnecessary expenditure of public funds, a policy consideration not present in the private sector. If individual employees may, at their whim, compel arbitration of all grievances regardless of merit and contrary to the desires of the employer and the bargaining agent, significant public funds will be spent on expensive arbitration proceedings which would otherwise not be expended. The parties to the collective bargaining agreement would therefore have less funds available for truley meritorious grievances and the employer might be compelled to settle non-meritorious grievances contrary to a reasonable interpretation of the collective bargaining agreement to avoid expense, thereby establishing an erroneous precedent applicable to subsequent grievances. The interference with the statutory goal of promoting harmonious and cooperative relationships between the government and its employees who have chosen to bargain collectively which would occur if the FEA's position were adopted, is accurately summarized by the following language from *Vaca v. Sipes*, 386 U.S. at 191-92:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

Contrary to FEA's assertion, then, the Commission's decision in *Heath* does not stand for the proposition that an individual has the unfettered right to avance a greivance through the contractual grievance procedure once the certified bargaining agent has exercised its exclusive right to discontinue processing the grievance based upon its good faith determination that the grievance lacks merit. As the above discussion demonstrates, such a conclusion is the antithesis of the concept of exclusively embraced by our decision in *Heath*. 5 FPER ¶10074 at 92. Accordingly, where the parties collective bargaining agreement reserves to the certified bargaining agent the exclusive right to submit grievances to arbitration, a public employer is not obligated to process an individual's grievance to arbitration if the certified bargaining agent has declined to advance the grievance because of its belief that the grievance lacks merit. Indeed, if the public employer does procees such a greivance to arbitration at the individual's request it might well violate Section 447.501(1) (a), (c), Florida

Statutes (1979). Such action could constitute circumvention of the bargaining agent and a unilateral alteration of the contractual grievance procedure. *Leon County CTA v. Leon County School Board*, 6 FPER ¶11001 at 4.

In this case the facts establish that the collective bargaining agreement grants all unit employees the opportunity to file grievances at Step I, but reserves to the LCTA the exclusive authority to advance these grievances to Step II through the final arbitrable step. The LCTA refused to process Hadley's grievance to arbitration following its express determination that the grievance lacked merit. Under these circumstances, irrespective of Hadley's membership or non-membership in the LCTA, the Association's actions do not constitute a waiver of its right to exclusively determine those grievances appropriate for arbitration. Therefore, the School Board is not obligated to proceed to arbitration upon Hadley's request.

It is so ordered.

PARRISH, Commissioner, concurring specially.

In light of my lengthy dissent in *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979), I feel it only appropriate that I explain my concurrence in the instant case. Since the issuance of the *Heath* decision (which was not appealed), the Florida Legislature has met in regular session three times. During those three sessions there have been a number of amendments to various sections of Part II of Chapter 447 of the Florida Statutes, but there has been no effort at modification of the statutory provisions relied upon in the *Heath* case in either the majority opinion or the dissent. I

think it is reasonable to presume that the Legislature is aware of the construction which has been placed on its enactments in the area of public sector collective bargaining by the agency charged with the administration of those enactments; especially where the issue is a significant one. Having engaged in that presumption, I think it is reasonable to construe the legislative silence on this issue during three consecutive sessions as a legislative ratification of the interpretation given to the applicable statutory provisions by the majority in the *Heath* case; or, at least, as a legislative acquiescence in the agency's interpretation.[6] Accordingly, although I continue to believe that the dissent in the *Heath* case was correct *when written*, I am now persuaded by three sessions of legislative silence that the majority view in the Heath case has proven to be a correct interpretation of the legislative will.

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[1]The School Board included in the petition a motion to stay the grievance/arbitration proceedings pending resolution of this matter, which was denied by the Commission. *In re School Board of Leon County*, 7 FPER ¶12119 (1980).

[2]By its terms the agreement is in effect from August 21, 1979 through August 20, 1982.

[3]*See Turner v. Air Transportation*, 468 F.2d 29, 300 (5th Cir. 1972); *St. Clair v. Local Union No. 515*, 1 BT, 442 F.2d 128, 130 (6th Cir. 1969); *Maggs v. PLRB*, 11 PPER ¶11103 (Pa.Comm. Ct. 1980); *Russell v. Patterson*, 10 PERB ¶7511 (N.Y. App. Div. 1976); *Norton v. Transportation Authority*, 90 LRRM 3054 (Mass. S.Ct. 1975).

[4]*Hughes Tool Company*, 56 NLRB 981, 14 LRRM 244 (1944) enforced 147 F.2d 69 (5th Cir. 1945) construing Section 9(a) of the National Labor Relations Act.

[5]For a discussion of the reasons that grievance processing in contract administration are considered as part of the collective bargaining process itself see Cox, *Reflections Upon Labor Arbitration*, 72 Har.L.Rev 1482. As the United States Supreme Court stated in *Conley v. Gibson*, 355 U.S. 45, 46 (1957);

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other work rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

[6]Although I have found no case precisely on point, I believe there is abundant support for this proposition when cases such as *State ex rel Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So.2d 529 (Fla. 1973), ("When the Legislature reenacts a statute it is presumed to know and adopt the construction placed thereon by the State tax administrators.") are read together with cases such as *Walker v. State, Dept. of Transportation*, 366 So.2d 96 (Fla. 1st DCA 1979), and *Austin v. Austin*, 350 So.2d 102 (Fla. 1st DCA 1977) (Long-standing statutory interpretations made by officials charged with the administration of the statutes are given great weight by the courts.).

Appendix E

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

Case No. CB-81-007
Order No. 81U-240
Issued: June 26, 1981

RUEL A. GALBREATH,

Charging Party,

v.

BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC.,

Respondent.

Harold D. Smith, Hollywood, attorney for charging party.

Richard H. Frank, of FRANK, CHAMBLEE & KELLY, P.A., Tampa, attorney for respondent.

SUMMARY DISMISSAL

POWERS, Chairman.

On March 16, 1981, Ruel A. Galbreath, a teacher, filed an unfair labor practice charge alleging that the Broward County Classroom Teachers Association, Inc., breached its duty of fair representation by failing to submit his grievance to arbitration, and thereby caused Galbreath's employer, the School Board, to discriminate

against him because of his non-membership in the Association in violation of Section 447.501(2)(a) and (b), Florida Statutes (1979). Having considered the charge and supporting evidence submitted by the Charging Party,[1] the Commission concludes that the charge is insufficient to establish a *prima facie* violation of the applicable unfair labor practice provisions.[2]

The evidence submitted by the Charging Party discloses that the Association is the certified bargaining agent for a unit of instructional personnel employed by the School Board. Article III of the existing collective bargaining agreement contains a three-step grievance procedure which affords individual employees the option to process their grievances with or without Association representation at steps I and II, but reserves to the Association the exclusive right to process all unit employees' grievances to arbitration at step III.[3]

On or about July 3, 1980, the Charging Party individually filed a grievance against the School Board alleging that it violated the collective bargaining agreement by refusing payment for certain overtime work. The School Board denied the grievance at steps I and II. By letter dated October 20, 1980, the Association notified the Charging Party that it had decided not to pursue the grievance to arbitration because, in its judgment, the grievance lacked merit. *No evidence was submitted which supports the Charging Party's contention that the Association's decision was based upon Galbreath not being a member of the Association.*[4]

An exclusive bargaining agent's authority to represent all members of a bargaining unit includes an obligation to "serve the interests of all members without hostility or discrimination toward any, to exercise its

discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In order to find that an employee organization breached its duty of fair representation by failure to process a grievance, the aggrieved unit member must demonstrate that the union abused its discretion and acted in an arbitrary or discriminatory manner or in bad faith when it decided not to proceed to arbitration. *Vaca v. Sipes*, 386 U.S. at 190; *Gow v. AFSCME, Local 1363*, 4 FPER ¶ 4168 (1978). Mere conclusional statements are not sufficient to establish bad faith, arbitrary, or discriminatory union conduct. *Balowski v. International U. United A. A. Imp. Workers*, 372 F.2d 829 (6th Cir. 1967); *Gow v. AFSCME, Local 1363*, 4 FPER ¶ 4168 at 325.

The evidence submitted by the Charging Party does not point to any specific instances of arbitrary, discriminatory, or bad faith conduct by the Association in processing his grievance. Viewed in the light most favorable to the Charging Party, the evidence simply establishes that the Association's decision to not process the grievance to arbitration was based on *its conclusion that the grievance did not constitute a violation of the collective bargaining agreement.* An employee organization's refusal to process a grievance does not alone, constitute a *per se* showing that the organization engaged in arbitrary, disciminatory or bad faith conduct. *Buchanan v. NLRB*, 597 F.2d 338 (4th Cir. 1978).

Accordingly the charge is insufficient to establish a violation of either subsections (a) or (b) of Section 447.501(2), Florida Statutes (1979). The charge is DISMISSED.

It is so ordered.

PARRISH and BROOKS, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on June 26, 1981.

BY: [Illegible]
Deputy Clerk

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[1]On April 13, 1981, the Association filed a motion for summary dismissal with a supporting affidavit. A motion to strike the Association's motion for summary dismissal was filed by the Charging Party on April 24, 1981. A memorandum in opposition to the Charging Party's motion to strike was filed by the Association on April 30, 1981. Neither Chapter 447, Part II, nor the Commission's rules authorize the Commission to consider evidence filed by a respondent to an unfair labor practice charge prior to our determination of whether the charge is sufficient. Section 447.503(2), Florida Statutes (1979). Therefore, the motion for summary dismissal has not been considered in this case.

[2]By order issued this date the Commission dismissed a companion charge filed by the Charging Party against the School Board of Broward County in Case No. CA-81-027.

[3]The Agreement, by its terms, is in effect from August 16, 1979 through August 15, 1982.

[4]Even assuming the Charging Party had submitted evidence to this effect, a *prima facie* violation of Section 447.501(2)(a), Florida Statutes (1979), would not be established. Section 447.401, Florida Statutes (1979), specifically absolves a certified bargaining agent from any obligation to process grievances for unit employees who are not members of the employee organization. *A union's duty of fair representation does not arise, therefore, where it declines to process a grievance to arbitration based solely on the grievant's non-membership status. See Coats v. Jacksonville City Employees Local Union 301*, 6 FPER ¶ 11213 (1980); *In re School Board of Leon County*, PERC Order No. 81D-238 (June 26, 1981).

Appendix F

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

Case No. CA-81-027
Order No. 81U-239
Issued: June 26, 1981

RUEL A. GALBREATH,

Charging Party,

v.

SCHOOL BOARD OF BROWARD COUNTY,

Respondent.

Harold D. Smith, Hollywood, attorney for petitioner.

Mark S. Seigle, Fort Lauderdale, representative for respondent.

SUMMARY DISMISSAL

POWERS, Chairman.

On March 16, 1981, Ruel A. Galbreath, a teacher, filed an unfair labor practice charge alleging that the Respondent violated Section 447.501(1)(a), (b) and (f), Florida Statutes (1979), by: refusing to discuss his grievance in good faith, denying him access to the grievance arbitration procedure; and otherwise interfering with, restraining and coercing him in the exercise of

his rights under Chapter 447, Part II. Having considered the charge and supporting evidence submitted by the Charging Party, the Commission concludes that the charge is insufficient to establish a *prima facie* violation of the applicable unfair labor practice provisions.[1]

The evidence contained in the charge discloses that the Broward County Classroom Teachers Association is the certified bargaining agent for a unit of instructional personnel employed by the School Board. Article III of the existing collective bargaining agreement contains a three-step grievance procedure which affords individual employees the option to process their grievances with or without Association representation at steps I and II, but reserves to the Association the exclusive right to process all unit employees' grievances to arbitration at step III.[2] On or about July 3, 1980, following unsuccessful attempts to secure payment for certain overtime work, the Charging Party filed a grievance alleging that the School Board's refusal to pay for such overtime work constituted a violation of Article VI-F of the collective bargaining agreement and the prevailing past practice.

In addition to the denial of the grievance at step I by the Charging Party's immediate supervisor, the grievant's request to be represented by counsel during the grievance hearings was rejected by the School Board's Director of Employee Relations. On September 8, 1980, following a hearing conducted in accordance with the step II contractual procedures, the Charging Party's grievance was denied. The Charging Party's subsequent attempts to persuade the Association to submit his grievance to arbitration were unsuccessful and he was notified by letter dated October 20, 1980,

that the Association decided not to pursue the grievance to arbitration. The letter stated:

> Having reviewed your case referred to above, CTA has decided not to pursue the matter to arbitration since in our judgment it lacks merit.
>
> In an effort to preserve your rights, we have requested and received an extension of the timeliness to file for arbitration to October 31, 1980. A letter from Mr. Seigle will confirm.
>
> I would recommend that you discuss this letter with your attorney to determine if you and he would want to pursue the matter on your own.

With regard to the alleged violation of Section 447.501(1)(f), Florida Statutes (1979), the evidence contained in the charge fails to establish that the School Board disregarded or refused to discuss the Charging Party's grievance in good faith. Representatives of the School Board met with the Charging Party at both steps I and II and discussed the alleged violations of the collective bargaining agreement. Although the grievance was denied by the School Board at both steps, an unfavorable resolution of a grievance is insufficient grounds, standing alone, to constitute a violation of Section 447.501(1)(f), Florida Statutes (1979). *McKay v. Metro Transit Agency/Dade County*, 6 FPER ¶ 11000 (1979). Moreover, the Charging Party has not established the essential element of a Section 447.501(l)(f), Florida Statutes (1979) violation; a steadfast failure and refusal by the public employer to process the grievance in good faith pursuant to the terms of the collective bargaining agreement. *See Liberty County NEA v. School Board of Liberty*

County, 6 FPER ¶ 11012 (1979); *International Association of Firefighters, Local 2353 v. City of Tarpon Springs*, 3 FPER 237 (1976).

The Commission also finds insufficient that portion of the charge alleging that the School Board improperly denied the Charging Party access to the arbitration procedure. The Commission has recently adopted the *universally held precedent* that where a collective bargaining agreement reserves to the certified bargaining agent the exclusive right to submit unit employee's grievances to arbitration, and a grievance has been rejected *on its merits* by the certified bargaining agent, the employer is not obligated to process that individual's grievance to arbitration. *In re School Board of Leon County*, Order No. 81D-238, (June 26, 1981).[3]

The collective bargaining agreement here reserves to a certified bargaining agent the exclusive right to process a unit employee's grievances to arbitration. The certified bargaining agent notified the Charging Party that it would not process his grievance to arbitration because it was, in the Association's judgment, without merit. Under such circumstances, the School Board is under no obligation to process the individual's grievance to arbitration. *The fact that the Association indicated that Galbreath may pursue the grievance on his own does not obligate the School Board to deviate from the contractual grievance procedure to process the grievance.*[4]

Accordingly, the charge is insufficient to establish a violation of subsections (a), (b) or (f) of Section 447.501(1), Florida Statutes (1979).

Therefore, it is DISMISSED.

It is so ordered.

PARRISH and BROOKS, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on June 26, 1981.

BY: [Illegible]
Deputy Clerk

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[1]By order issued this date the Commission dismissed a companion charge filed by the Charging Party against the Broward County Classroom Teachers Association in Case No. CB-81-007.

[2]The Agreement, by its terms, is in effect from August 16, 1979 through August 15, 1982.

[3]*See Vaca v. Sipes*, 396 U.S. 171, 194 (1967); *Humphrey v. Moore*, 375 U.S. 335, 350 (1964); *Ford Motor Company v. Huffman*, 345 U.S. 330, 337 (1953); Rabin, "Protection of Rights", in *Portrait of a Process—Collective Negotiations in Public Employment* 297-304 (1979).

[4]Where the certified bargaining agent has refused to process a grievance to arbitration because of its determination that the grievance lacks merit, the employer is entitled to refuse to arbitrate that grievance by reason of a presumption that the union's decision was not made arbitrarily, discriminatorily or in bad faith. *See Vaca v. Sipes*, 386 U.S. 171. Likewise, where the union refuses to process a grievance to arbitration, but instructs the employee that he may pursue the grievance to arbitration on his own, the employer is entitled to presume that the Union has relinquished its contractual right to exclusively process that grievance to arbitration. Under such circumstances, should the School Board choose to process the grievance to arbitration, the Association would be estopped from asserting a violation of Section 447.501(1)(c), Florida Statutes (1979).

Appendix G

Excerpts from pages 3 & 4 of Galbreath's unfair labor charge dated March 12, 1981 and filed with PERC.

In the instant case the Employer's and Union's refusal to arbitrate shows that the only way an employee in the exclusive bargaining unit can be assured of a right to a fair and equitable grievance procedure is to become a member of a labor organization. This result is inconsistent with principles of federal labor law and due process. The duty of fair representation doctrine was developed in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act. See *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210. Said doctrine was soon extended to unions certified under the National Labor Relations Act. See *Ford Motor Co. v. Huffman*, 345 U.S. 330. This doctrine was also extended to the Federal and State Public Labor Sector and was applied diligently by the Florida courts, until Florida Statute 447.401 was amended to except nonmembers of the union from the union's obligation to represent.

Excerpts from pages 23 & 24 of Galbreath's Initial Brief dated November 24, 1981 and filed in the Florida Court of Appeal.

The effect of F.S. §447.401 is to remove a public sector union's duty of fair representation to non-dues-paying members of the exclusive bargaining unit. In relieving the Union of any obligation to process grievances

of Galbreath, and all other non-dues-paying members, F.S. §447.401, on its face, presents a prima facie case of violation of the Union's duty of fair representation in that a failure to process the grievances of both union and non-union members, equally, is a breach of duty of fair representation. *Vaca v. Sipes* provides that under the duty of fair representation doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. F.S. §447.401, on its face, violates federal labor laws establishing a union's duty of fair representation. It has recently been held, in Florida, that public sector employees are entitled to the same rights as private sector employees. *City of Tallahassee v. Public Employees Relations Commission*, 393 So.2d 1147 (1st DCA 1981). It is clear that private sector employees have an equal right to a duty of fair representation from the union for all members of an exclusive bargaining unit. According to the principle set forth in the *City of Tallahassee* case, Galbreath is entitled to that same right of duty of fair representation that is enjoyed by the members of the Union that represents the exclusive bargaining unit in which Galbreath is included.

Excerpts from page 2 of Galbreath's Reply Brief dated February 22, 1982 and filed in the Florida Court of Appeal

A large portion of School Board's Brief goes into the history of the duty of fair representation in citing

many private sector decisions that, of course, have no relevancy to the Galbreath case in that the private sector has not removed the duty of fair representation from unions with reference to nonunion members. Finally, the School Board gets to the PERC decision of *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979). Like the union and PERC, the School Board tries to convince the court that it should follow PERC's interpretation of F.S. §447.401 and that it can be reassured that PERC will not allow the statute to be applied in an unconstitutional way. The court does not need to look to PERC's interpretation of F.S. §447.401 in order to tell whether it is unconstitutional. The language, on its face, is unconstitutional in that it removes the duty of fair representation from the union for nonmembers.

Excerpts from the index and pages 26, 27 & 28 of Galbreath's Initial Brief dated March 21, 1983 and filed in the Florida Supreme Court

Issues and Argument:

I. CAN PETITIONER BE LEGALLY FORECLOSED FROM ARBITRATION UNDER §447.401, FLORIDA STATUTES (1979) 7

II. IS FLORIDA STATUTES §447.401 IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FLORIDA RIGHT TO WORK LAW, ARTICLE I, SEC. §, OF THE FLORIDA CONSTITUTION AND HIS RIGHTS UNDER THE U.S. CONSTITUTION AND FEDERAL LABOR LAW 19

Galbreath has maintained all along, that PERC would have to have a "crystal ball" to know whether a union's refusal to request arbitration is influenced by the grievant's nonmembership status. All of this speculation could be eliminated by striking down F.S. §477.401 as being unconstitutional and thereby restoring the duty of fair representation to all employees in Florida, who hold jobs in exclusive bargaining units.

As stated earlier, a union cannot be permitted to decide to whom it will extend its duty of fair representation. The duty is statutorily imposed as a quid-pro-quo for the union's statutory right to exclusive representation. The union cannot, as PERC claims, waive its right of exclusivity. The U.S. Court of Appeals, Fifth Circuit supports Galbreath's argument that F.S. §447.401 is unconstitutional. The court, citing *Steele, supra*, stated in *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. National Labor Relations Board*, 368 F.2d 12, 17 (1966).

> Indeed, the Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation. *Steele v. Louisville & N.R.R., supra*, 323 U.S. at 198-199, 65 S.Ct. at 230, 89 L.Ed. at 180-181.

The foregoing case is dispositive of the question of whether F.S. §447.401 is unconstitutional. Galbreath maintains that upon enacting the proviso in 1977, the Florida Legislature made F.S. §447.401 unconstitutional

on its face by removing the duty of fair representation to non-members who are included in the certified bargaining unit. The proviso might well have made the entire Part II, of Chapter 447 unconstitutional. Chapter 447, Part II, bestows upon the unions the exclusive right to represent all employees in a certified bargaining unit and, according to the Fifth Circuit, if said statute fails to impose the duty of fair representation, it is unconstitutional.

The Fifth Circuit also stated that:

> . . . when the individual employee, pursuant to federal law aimed at preserving industrial harmony, is required to surrender completely his right of self-representation in deference to an "exclusive" bargaining agent designated by a majority of his co-workers, both logic and equity dictate that such agent be impressed with a reciprocal duty to "represent all its members, the majority as well as the minority, and * * * to act for and not against those whom it represents."

It is only logical that the Union could no more waive its right to exclusivity than Galbreath could unilaterally withdraw from the certified bargaining unit. The effect of §447.401 thus is to cut off non-union members from any meaningful access to the grievance procedure. This is a clear violation of the union's constitutional duty of fair representation, for non-union members are treated unequally even though exclusivity is maintained.

Excerpts from pages 4, 5 & 6 of Galbreath's Motion for Rehearing dated February 9, 1984 and filed in the Florida Supreme Court.

It is respectfully requested that this Court reconsider its ruling, grant a rehearing and issue an opinion that interprets F.S. 447.401 in a manner which makes its intent and meaning clear and certain, especially as to its relationship to Federal Labor Law and rights of due process and equal protection of the law.

By adopting PERC's ruling in *In re Leon County School Board*, without further comment, it is unclear as to how the Court views the proviso as it relates to Federal Labor Law, due process and equal protection of the law. The Court did show substantial concern during oral argument about the Union having the final say on the merits of Galbreath's grievance and as to whether he would be allowed access to arbitration. However, no comment was made on that issue in the final opinion. During oral argument, the question was raised as to whether the union could meet the requirements of being an impartial arbitrator where non-dues paying members are involved. The question was also raised as to why the union would want to do anything for a non-dues paying member. In response it was pointed out that Galbreath did not ask the union to do anything except to request arbitration to enable him to present his case to an impartial arbitrator through his own legal counsel. The Court noted that it was not likely to appear on the face of the record when a union refused to represent a non-member due to his non-member status.

It is respectfully suggested that the Court overlooked the significance of cited case law on lack of due process as it relates to Galbreath's entitlement to have an unbiased adjudicator determining whether his case had merit. The case law indicates that if there is inherent conflict between the union and the individual employee whose grievance is being denied on the grounds the grievance lacks merit, a question is raised under due process as to whether the union is sufficiently unbiased to determine the merits of the employee's grievance. *Gibson v. Berryhill*, 411 U.S. 564 (1973). There can be no doubt there was conflict between the CTA and Galbreath, who was not a dues-paying member of the union. These circumstances placed the union in a position where it was not sufficiently unbiased to determine the merits of Galbreath's grievance. The record submitted to PERC clearly shows there was sufficient merit to Galbreath's claim for overtime to at least entitle him to a hearing on the unfair labor practice charge to determine the type of investigation conducted by the union before it refused to request arbitration. The case law holds that a union's failure to fully investigate the facts constitutes a breach of duty of fair representation. *Tenorio v. NLRB*, 680 F.2d 598 (9th Cir. 1982). The evidence in this case shows the union failed to conduct even a minimal investigation. Had PERC scheduled a hearing, the union's failure to investigate would have been more clearly brought out.

It is respectfully suggested that in a case such as Galbreath's where the union has exclusive control of the grievance procedure and at the same time is authorized by statute to refuse to represent him as a non-member of the union, the union should have the burden of proof that it made a reasonable investigation

of the non-member's grievance before refusing to request arbitration. Otherwise, it should be assumed the refusal is based upon non-member status and the employee should be permitted to go to arbitration with his own legal counsel.

In light of the proviso of F.S. 447.401 there can be no doubt the union fails to meet due process requirements that an unbiased adjudicator determine the merits of Galbreath's grievance. Galbreath is entitled to a neutral or detached judge in the first instance to make the decision on whether his case is sufficiently meritorious to request arbitration. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill, supra.* The grievance procedure in this case is structurally biased in that it is designed primarily to serve the interests of the union and the public employer yet the union can refuse to represent someone in Galbreath's class and due to the language of the Collective Bargaining Agreement the employer also can refuse to permit the non-member to go to arbitration with his own counsel. It is patently unjust and a violation of Federal Labor Law to allow the union, as PERC has stated in *In re Leon County School Board*, to determine whether it desires to exercise its right of exclusive representation on behalf of non-members. Galbreath has no option to determine whether he wants to withdraw from the exclusive bargaining unit. He is forced into that position by statute F.S. 447.307(3)(b). Galbreath is forced to use the grievance procedure negotiated by a union that has been given a right to waive its exclusive representation rights over him when it suits the union's desires to do so. If this be the case, then Galbreath should have the right to withdraw from the certified bargaining unit and not be bound by the collective bargaining agreement grievance procedure

in pursuing his grievances with the employer. PERC's interpretation of the proviso is contrary to Federal Labor Law and due process.

F.S. 447.401, on its face, violates the equal protection clause. The distinction between a member and non-member violates the equal protection clause by distinguishing between classes of employees on a basis which is unrelated to the merits of an employees grievance. *Logan v. Zimmerman Brush Co.*, 102 S.Ct. 1148 (1982). There can be no rational basis for the proviso in F.S. 447.401. The only logical explanation for adopting the proviso is to get around the provisions of the Right to Work Law. Galbreath maintains that F.S. 447.401 runs afoul of Federal Labor Law by removing the union's duty to represent a certain class of employees while retaining its right to exclusive representation of said class of employees.

Appendix H

Letter from Galbreath's Principal Regarding Overtime Pay

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

December 5, 1978

Mr. James E. Maurer
Superintendent of Schools
School Board of Broward County, Florida
Fort Lauderdale, Florida

Dear Mr. Maurer:

I received your letter of December 1, 1978, concerning Mr. Ruel Galbreath, Horticulture Instructor at Boyd Anderson High School. To your question, "Did I authorize additional hours beyond the contract?" The answer is "no"; however I have no control over weather conditions and Mr. Galbreath probably would have been negligent had he not used his own discretion in protecting School Board property.

Please advise this office if you wish payment authorized because this circumstance is not spoken to by prescribed policies and procedures. Kindly advise me of your decision in this matter.

Respectfully yours,

John E. Aycock
Principal

JEA/eb

Handwritten Note from bottom of Letter Dated Dec 5, 1978

John —

I am not running Boyd Anderson or am I authorizing any payment for anything beyond 7½ hours.

Jim Maurer